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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1945

MAY DEPARTMENT STORES, DOING BUSINESS AS FAMOUS-BARR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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No. 39

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v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 264–273) is reported in 146 F. 2d 66. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 45–56) are reported in 53 N. L. R. B. 1366. The decision and direction of election in a prior representation case, which forms part of the record in this case (R. 7–13), is reported in 50 N. L. R. B. 669.

JURISDICTION

The decree of the court below (R. 284–285) was entered on January 11, 1945. The petition for a writ of certiorari was filed on February 21, 1945, and granted on April 9, 1945 (R. 287, 288). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and on Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether it is an unfair labor practice, under Section 8 (1) of the National Labor Relations Act, for an employer, without notifying the certified exclusive bargaining representative of the employees in an appropriate unit or affording such representative an opportunity to negotiate, unilaterally to take action respecting wage increases for such employees and to inform the employees of such action.

2. Whether the cease and desist provisions of the Board's order, as sustained by the court below, are within the Board's authority.

3. Whether the Board could properly find that the employees in petitioner's busheling rooms constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

4. Whether, having decided that the holding of an election was warranted by the petitioning

union's showing that a substantial number of employees in the unit had authorized its affiliate to represent them for purposes of collective bargaining, the Board could properly certify, as exclusive bargaining representative of employees in an appropriate unit, a labor organization which received a majority of the votes cast in a Board-conducted election.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in Appendix A, *infra*, pp. ~~74-78.~~ 75-79.

STATEMENT

Pursuant to a petition filed by St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, affiliated with the Congress of Industrial Organizations, herein called "the Union" (R. 3–4), the Board conducted a hearing and, on June 16, 1943, issued its Decision and Direction of Election in which it found that all of petitioner's employees "working in the busheling room, second floor, Department 280, and in the busheling room, basement, Department 281, including regular extra employees, but excluding the two foremen and all other employees of the Company, constitute a unit appropriate for the

purposes of collective bargaining" (R. 12).[1] The evidence in support of this finding (R. 9–11) may be summarized as follows:

Petitioner owns a retail department store in St. Louis, Missouri. In departments 280 and 281 of its store, which are variously called busheling rooms, alteration rooms, or tailor shops (R. 72), alterations and repairs are made on men's and boys' suits, overcoats, trousers, and sportswear sold to customers (R. 69, 72). In Department 280, located on the second floor balcony in a segregated space (R. 69–71), approximately

[1] These employees are bushelmen. In the retail trade, a bushelman is a general tailor "who makes alterations on men's ready-to-wear garments, by hand and machine sewing" and "may also fit and mark garments." *Dictionary of Occupational Titles, Part I, Definitions of Titles*, United States Department of Labor, United States Employment Service (Washington, 1939), pp. 118, 921; *Job Descriptions for the Retail Trade*, United States Department of Labor, United States Employment Service (Washington, 1938), p. 287. In the retail trade, persons who make alterations on women's ready-to-wear garments are classified in a number of ways but are not bushelmen. *Dictionary of Occupational Titles, loc. cit. supra; Job Descriptions for the Retail Trade, op. cit. supra*, at 299. In the garment manufacturing industry, on the other hand, a bushelman "repairs and alters shape of men's and women's garments that have been rejected as defective, performing all cutting of stitches, trimming of parts, rearrangement of padding, and hand or machine sewing that may be required." *Job Descriptions for the Garment Manufacturing Industry*, United States Department of Labor, United States Employment Service (Washington, 1941), p. 141; *Dictionary of Occupational Titles, loc. cit. supra.*

twenty-seven busheling employees are regularly employed to mend and alter clothes sold to customers on the second floor (R. 215–216, 68–69). In Department 281, located in the basement, three regular employees (R. 216, 108) are engaged in mending and altering clothing sold in the basement (R. 72, 111–112); additional employees worked in Department 281 during certain sales (R. 11, 108). Such employees have special hours of work which differ in starting time and length of lunch period from those of the salespeople, clerks, wrappers, and cashiers (R. 71–72). Bushelmen are classified according to their functions, as fitters, markers, tailors, or tailoresses, finishers, pressers, operators, examiners, and rippers (R. 223–225, 109). Except for the fitters, who mark the clothes for alteration on the customers, the bushelmen apparently have no contact with petitioner's customers or sales employees (R. 68–71, 115, 118–119, 120–122, 216). Busheling is regarded as skilled work and as a trade (R. 223–224, 112–113, 116, 127–128).[2]

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[2] Stowell, C. J., *The Journeymen Tailors' Union of America—A Study in Trade Union Policy* (1918), p. 135; *Job Descriptions for the Garment Manufacturing Industry*, United States Employment Service (Washington, 1938), p. ment Service (Washington, 1941), p. 141; *Job Descriptions for the Retail Trade*, United States Department of Labor, United States Employment Service (Washington, 1938), p. 287; Stowell, C. J., *Studies in Trade Unionism in the Custom Tailoring Trade*, Pub. by the Journeymen Tailors Union of America (Bloomington, 1913), pp. 24–25.

For about ten years, between 1910 and 1920, the bushelmen of all department and retail clothing stores in St. Louis, including petitioner's store, were organized and were represented by a local of the Journeymen Tailors Union (R. 218–223, 227, 232, 105, 139–140) which had a contract with an employers' association of which petitioner was a member (R. 221–223, 227, 139–140). While the bushelmen were not represented by any union between 1920 and 1942 (R. 208),[3] the petitioner has, for more than twenty years, been bargaining and contracting with numerous craft unions representing teamsters, electricians, carpenters, painters, and upholsterers (R. 240–241; 245–246).[4] The organization of bushelmen on a craft basis is common in the clothing industry (R. 220–225).[5] The bushelmen were fully organized and had ex-

[3] There was evidence that the bushelmen had collectively requested and received raises in pay in 1941 and 1942, while they were not represented by any union (R. 208–210, 214–215, 79–80). As a result of their requests, about 75 percent of them received a raise in 1941 and all received a raise in 1942 (R. 79–80, 143–145, 149).

[4] Petitioner also contracted with carpet layers, shoe repair workers, and picture frame workers, though for what period of time does not appear (R. 252).

[5] Hardman, J. B. S. (ed.), *The Amalgamated Today and Tomorrow* (New York, 1939), pp. 89–90; *Report of the General Executive Board and Proceedings of the Thirteenth Biennial Convention of the Amalgamated Clothing Workers of America; Documentary History, ACWA: 1938–1940* (New York), pp. 93–94, 98–99; Stowell, C. J., *The Journeymen Tailors' Union of America—A Study in Trade Union Policy* (1918), pp. 82–128.

pressed a desire to be represented in a separate unit (R. 72–73, 80–83). No labor organization claimed to represent petitioner's employees on a more comprehensive scale (R. 6, 11, 81).

On the basis of the foregoing facts, the Board rejected petitioner's contention that only a store-wide unit would be appropriate and, applying its "extent of organization" theory,[8] concluded that "collective bargaining should be made an immediate possibility for the employees in the busheling rooms without requiring them to await the uncertain date when the employees may be organized in a larger unit" (R. 11).

The Board also rejected petitioner's contention that a unit of employees in the men's busheling rooms would be inappropriate unless it included the employees in the women's alteration department and in the fur work room (R. 11, 146). It

[8] The Board believes that the purposes and policies of the Act are usually effectuated by permitting immediate access to the Act's machinery to small, fully organized groups of employees with mutual interests in the subject matter of collective bargaining. See National Labor Relations Board, *Second Annual Report* (1937), pp. 123–124; *Third Annual Report* (1939), pp. 157–158, 160, 163; *Fourth Annual Report* (1940), pp. 83–84; *Sixth Annual Report* (1942), p. 63; *Seventh Annual Report* (1943), pp. 59–60; *Eighth Annual Report* (1944), p. 53; *Ninth Annual Report* (1944), p. 33; *Matter of R. C. A. Communications, Inc.*, 2 N. L. R. B. 1109, 1115; *Matter of Gulf Oil Corp.*, 4 N. L. R. B. 133, 137; *Matter of Stockholders Publishing Company, Inc.*, 28 N. L. R. B. 1006, 1025–1026; *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 132–135.

pointed out (R. 11) that "there is historically a sharp demarcation between the trades involved" (R. 102–103, 219–226, 231, 243, 261–262); "traditionally, such workers have been represented by separate craft unions" (R. 102–103, 224–226, 231, 243); the women's clothing alteration workers are located in a different part of the store from the men's (R. 68–70, 125); and there is no substantial interchange of employees from one to the other (R. 74–77, 150, 153).[7]

It is the Board's usual practice to proceed with an investigation of a question concerning representation only where a substantial number of the employees in the appropriate unit have shown an interest in being represented by the labor organization involved,[8] and there was introduced at the hearing a report of the Board's regional director (R. 155–156) which recited that the Union had submitted authorization cards signed by a large number of employees in the unit.[9] On the basis

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[7] Such few transfers as did occur were either permanent (R. 150) or were intended to reduce the size of the busheling force (R. 443).

[8] See National Labor Relations Board, *Eighth Annual Report* (1944), p. 44; *Sixth Annual Report* (1942), p. 55.

[9] The authorizations ran to the United Department Store Employees Union, affiliated with the United Retail, Wholesale and Department Store Employees of America, C. I. O. (R. 155–156), the former being one of the locals affiliated with the Union (R. 106). As the Board found (R. 8), the Union represents its local affiliates in collective bargaining, and the employees were cognizant of this (R. 90, 213).

of this report, the Board concluded that the holding of an election was warranted (R. 9), and directed that an election be conducted to determine whether the employees in the unit desired to be represented by the Union, or by the American Federation of Labor,[10] or by neither (R. 12–13). The Board directed that the name of the American Federation of Labor appear on the ballot despite the fact that that organization presented no evidence that it had been authorized to represent any employees in the unit involved (R. 9, 12–13). The A. F. of L. was subsequently permitted to withdraw, and its name did not appear on the ballot (R. 23). The election was held on June 29, 1943, and thirty-six votes were cast for the Union and one against it (R. 24–25). The Board accordingly certified the Union as the exclusive bargaining representative of all the employees in the unit (R. 25–26).

Thereafter, on December 17, 1943, upon the usual proceedings, the Board issued its decision and order finding that, after the certification, petitioner had refused to bargain with the Union in violation of Section 8 (5) of the Act and that by such refusal and by other conduct petitioner had violated Section 8 (1) of the Act (R. 45–56). The evidence in support of these findings may be summarized as follows:

[10] The American Federation of Labor and its affiliated international unions had moved to intervene in the representation proceeding (R. 5–6).

On July 8, 1943, the Union requested petitioner to bargain concerning wages, hours, and working conditions for the employees in the appropriate unit (R. 193). Petitioner, on July 19, 1943, rejected this request, asserting that the unit was not appropriate for collective bargaining (R. 194).

Subsequently, without consulting the Union, petitioner decided to increase by $2 per week the salaries of substantially all its employees, including those represented by the Union as exclusive bargaining agent. On August 31, 1943, still without notifying the Union, petitioner applied to the National War Labor Board for approval of its plan to grant this increase and to make the increase retroactive to August 2, 1943 (R. 194–198). A form submitted with the application required the applicant to list the groups of employees whose wages had been negotiated or were then the subject of negotiation with labor organizations and the names of such organizations (196 A). Petitioner listed electricians, carpenters, painters, and plasterers, and their collective bargaining representatives, but not the bushelmen and the Union (R. 197). In a letter accompanying the application,[11] petitioner stated (R. 195; see also R. 197–198):

> The application which covers the employees at the store shows that we have Union contracts and working agreements which

[11] Two applications were submitted covering different groups of employees (R. 194–195).

cover certain craftsmen, including electricians, painters, carpenters, and plasterers. These employees, being covered by collective bargaining agreements, are excluded from this application.

Petitioner further stated that the Union represented the employees in the busheling rooms and had been certified by the Board, but that the applicant viewed the unit as inappropriate and intended to disregard the Board's certification to test its position in the court. It stated that it had neither recognized nor bargained with the Union and intended to include the busheling employees in its application. Finally, it stated that it did not believe that the Union had "any interest whatever in the enclosed application" but that, in the event that the Union should [redacted] object to the inclusion of the busheling employees, the application should be considered amended so as to exclude them (R. 195).

Thereafter, on September 1, 1943, petitioner's superintendent of employment announced to the employees the filing of this unilateral application over a public address system in the store (R. 187–188, 204–206), and a further announcement to the same effect appeared in petitioner's store newspaper on September 3, 1943 (R. 206A). In both announcements, petitioner stressed the voluntary nature of the proposed increase and the fact that if it was approved, the accumulated amount of the increase would be paid in a lump sum (R. 204–

206A). On the same day, September 3, the Union filed a charge that petitioner had refused to bargain on July 19, 1943, and had thereafter taken the unilateral action described above (R. 26–27). On September 11, 1943, petitioner's vice president made a speech to the employees over its public address syster. in which he stated that he had no news as to the status of the application, and without explaining what prompted him to speak to the employees said: "* * * we did not expect to talk to you again on the subject [of the application for a wage increase] as soon as this, and still less did we think it would be necessary to make such a statement as we now have to make. * * * We have filed these applications in good faith and will do everything we can to secure their approval as soon as possible. We sincerely hope that nothing will occur which will delay or obstruct or prevent this approval" (R. 189–190).

Adopting, without restatement, the findings and conclusions of the trial examiner who conducted the hearing (R. 45), the Board found (R. 51) that petitioner, on July 19, 1943, and thereafter, had refused to bargain collectively with the Union in violation of Section 8 (5). The Board further found (R. 52) that petitioner's action "in ignoring the Union while attempting to win approval of its proposal for wage increases, and in publishing the facts of its unilateral action to its employees, including employees represented by the Union, had the effect of depriving the Union

of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent. The said action may, therefore, reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation." The Board concluded that "by its unilateral action in seeking approval of its proposed wage adjustments, and by statements of its officers and its publication Store Chat addressed to employees concerning said unilateral action, the [petitioner] interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act," in violation of Section 8 (1) (R. 53, 54). It ordered petitioner to: 1. Cease and desist from: (a) refusing to bargain with the Union; (b) "in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." 2. Take the following affirmative action: (a) upon request, bargain collectively with the Union; (b) post notices; (c) notify the regional director for the fourteenth region what steps it has taken to comply with the Board's order (R. 45–46).

On March 14, 1944, the Board filed a petition in the court below to enforce the Board's order (R. 57–59). On December 20, 1944, the court announced its opinion (R. 264–273) in which it decided that the Board's order should be enforced. Thereafter, petitioner filed a petition for rehearing (R. 273–283). On January 11, 1945, the court entered its order modifying the Board's order by limiting paragraph 1 (b) thereof so that the petitioner is required to cease and desist from interference with the rights of only the employees in the busheling rooms, and denying the petition for rehearing [12] (R. 283–284). On the same day, the court entered its decree enforcing the Board's order as modified (R. 284–285).

SUMMARY OF ARGUMENT

I

The Board's conclusion that the petitioner violated Section 8 (1) of the National Labor Relations Act by taking unilateral action affecting the wages of employees without previously notifying or consulting their exclusive bargaining agent and by calling this action to the attention of the employees is supported by the uniform holdings of this Court and the circuit courts of appeals. The principle that an employer may not alter existing terms of employment without previously notify-

[12] While the Board believes that the court's modification of paragraph 1 (b) is improper, it has not sought review of that modification.

ing the exclusive representative and affording it an opportunity to negotiate concerning the proposed change was embedded in the philosophy of collective bargaining at the time the Act was adopted and is regarded as axiomatic by experts in labor relations. Under the Act, just as individual bargaining is outlawed as the antithesis of collective bargaining, so unilateral alteration of conditions of employment is outlawed as the antithesis of bargaining itself. Such unilateral action by an employer frustrates the desire of workers for a voice in the making of decisions which affect their daily lives and strikes at the fundamental motive for self-organization. In the instant case petitioner's conduct, because of the circumstances of the war emergency, practically removed rates of pay from the field of bargaining open to the Union and destroyed *pro tanto* the value of union membership in the eyes of the employees. Moreover, by implying in its announcement regarding the projected wage increase that the Union could vindicate its position as bargaining agent only at the employee's expense, petitioner, as the Board found, created an apparent conflict of interest between the employees and their representative, thus further discouraging union membership and affiliation.

II

Having found that petitioner had violated Section 8 (1) of the Act, not only by its refusal to

bargain, but by its unilateral request for a wage increase and statements to its employees with respect to such unilateral act, the Board properly ordered petitioner to cease and desist from violating Section 8 (1). The National Labor Relations Act expressly authorizes the Board to enjoin "such unfair labor practice" as it has found to have been committed, and it is clear that the reference is to each of the five unfair practices outlined in Section 8. Consequently, the circuit courts of appeals have generally construed the Act as evidencing a Congressional intent that Board orders be framed to prohibit all unfair labor practices of the type or class committed, and not merely the repetition of the precise form of acts previously committed or the commission of substantially identical acts. If the Act were more narrowly construed, its enforcement would bog down in procedural delays which would, as a practical matter, operate as a rejection of the Congressional judgment that one violation of the Act was likely to lead to others.

The order here entered is consistent with the uniform administrative practice under the Act, and with the decision of this Court in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426. In that case, this Court pointed out that a refusal to bargain alone might warrant the type of order here entered if the Board made a "finding based either on the specific circum-

stances disclosed by the record or on its own "expert judgment" of the relation between the acts found to have been committed and the policy embodied in Section 7. Here, there was not merely a refusal to bargain but a direct and substantial infringement of the rights granted by Section 7, and the Board's findings reveal the close relationship between the acts committed and all the rights enumerated in Section 7 and protected from infringement by Section 8 (1).

A consideration of the conceivable alternative orders compels the conclusion that the order, as it stands, is neither too broad nor defective in any other way, but is an appropriate exercise of the Board's power. The rights protected by the Act are specific and relatively narrow. While there are many methods of interference with those rights, the rights themselves are, on the whole, simple and readily understood, and generally no ingenuity is required to refrain from such interference.

III

Designation of the appropriate unit is a matter for determination in each individual case, and, in investing the Board with this function, Congress did not restrict it to the use of inflexible rules. The power committed to the Board is a broad power of discretion, the exercise of which is final unless clearly arbitrary or capricious. The Board's determination that the employees in pe-

titioner's busheling rooms constitute an appropriate bargaining unit was a proper exercise of the Board's discretion.

In grouping the bushelmen separately for bargaining purposes, the Board took into consideration the fact that they are a readily identifiable, homogeneous group of workers, engaged in a traditional skilled craft. The Board also based its unit determination upon the fact that the bushelmen were fully organized and had expressed a desire to be represented in a separate unit, and that no labor organization claimed to represent petitioner's employees on a more comprehensive scale. Where other factors are favorable, the Board, as in the instant case, permits immediate access to the Act's machinery to small, fully organized groups of employees with mutual interests in the subject matter of collective bargaining. A small, presently organized craft group, it is thought, should not be denied representation solely because an industrial store-wide unit might eventually be more desirable. This "extent of organization" principle has been approved by this Court. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 132–135.

The Board also properly rejected petitioner's contention that the employees in the women's alteration department and the fur work room must be included in the unit. The Board took note of the facts that, traditionally, where alteration departments have been organized on a craft basis,

the women's and men's alteration workers have been represented by separate craft unions and, in the instant case, that there was no fluidity of interchange of personnel requiring a broader unit in order to make collective bargaining effective.

IV

Since the Union received a majority of the votes cast in a Board-conducted election to determine the exclusive bargaining representative of petitioner's employees in an appropriate unit, it was properly certified by the Board. The validity of the Board's certification is in no way impaired by the fact that the authorization cards, upon the basis of which the Board determined that an interest in representation existed and that an election should therefore be held, ran to one of the locals affiliated with the Union, rather than to the Union. The Board found that the Union represents its local affiliates in collective bargaining and was, therefore, eligible to file a petition for investigation and certification of representatives.

The showing of interest in representation which the Board requires of the party filing such a petition is merely a self-imposed administrative requirement to advise the Board, as a preliminary matter, that there is sufficient justification for proceeding with the investigation of representatives. But even if the Board is required to de-

termine the petitioning union's interest in representation, that requirement was met here. In any event, the Board's decision to put the Union on the ballot did not prejudice petitioner; only an employee would have standing to raise such an objection.

ARGUMENT

I

THE BOARD PROPERLY FOUND THAT PETITIONER VIOLATED SECTION 8 (1) OF THE ACT

Section 7 of the National Labor Relations Act guarantees to employees "the right to self-organization, * * * to bargain collectively through representatives of their own choosing." Section 9 (a) provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *." Section 8 (1) of the Act forbids interference by employers with the rights guaranteed to employees in Section 7.

The obligations thus imposed upon employers encompass not alone "the negative duty to treat with no other" than the statutory representative with respect to proposed changes in rates of pay,

hours of employment, or other conditions of employment (*National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 44), a duty which precludes bargaining with individuals, groups, or other representatives (*Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678; cf. *J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332), but also the affirmative duty to notify and bargain in good faith with the exclusive representative before putting any such changes into effect. (Cf. Section 8 (5)). The existence of this affirmative duty was recognized in *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 684. There, as here, after a collective bargaining representative had been selected, the employer granted a wage increase without notifying or consulting the Union. The Court held that the employer, "by ignoring the union as the employees' exclusive bargaining representative" when making a change in wage rates, had violated Section 8 (1) of the Act. The Court's finding of violation in this aspect of the employer's conduct was independent of its additional findings that the employer had failed to observe its negative duty "by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending," and had, "quite apart" therefrom, further violated the Act "by inducing its employees to abandon the union by promising them higher wages" (*ibid.*). Petitioner's conten-

tion that the *Medo Photo* case "is distinguished from the case at bar in that there were in that case direct negotiations between the employer and the employees" is therefore clearly erroneous, as is its contention that the case is not controlling because here, unlike the *Medo* case, "the salary increase was not conditioned in any way" (Br. 34). Questions of the employer's motive in raising or lowering wages, moreover, are relevant only in determining whether or not the change was made to induce employees to refrain from joining or to repudiate a collective bargaining representative, and was consequently an unfair labor practice; they are irrelevant where, as here, the Board's finding turns not on the motive for the particular change in terms of employment but solely upon the unilateral nature of its effectuation.[13]

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[13] The Board emphasized this distinction in *Matter of Oughton*, 20 N. L. R. B. 301, 318, enforced, 118 F. 2d 486, 494, 498 (C. C. A. 3), certiorari denied, 315 U. S. 797, where the employers contended, as petitioner does here (Br. 36–39), that their unilateral action should not be found an unfair labor practice because the substantive change in terms of employment was not motivated by anti-union considerations. The Board said: "We do not here pass upon any question as to the business necessities which may have prompted the respondents to effect the wage reduction and the increase in hours of labor. It is the respondents' failure to give prior notice or to consult with the Union regarding these matters and not the wage reduction and increase in hours, themselves, which we have scrutinized." See also, *Matter of Whittier Mills Co.*, 15 N. L. R. B. 457, 466, enforced, 111 F. 2d 474 (C. C. A. 5). On the other hand, *Peter J. Schweitzer, Inc.*

The employer's affirmative duty under Section 8 (1) is correlative with, and springs from, "the right of the representatives of the unit to be consulted and to bargain" about all matters affecting terms and conditions of employment, including "the exceptional as well as the routine rates, rules and working conditions." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U. S. 342, 347. Recognizing, as does this Court, that the right is embedded in Section 7 of the Act, the Board and the circuit courts of appeals have uniformly held that once an exclusive bargaining representative has been selected, the employer may not alter existing terms of employment without previously notifying the exclusive representative and affording it an opportunity to negotiate concerning the proposed change.[14]

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v. *National Labor Relations Board*, 144 F. 2d 520 (App. D. C.), upon which petitioner relies, involved no question of an employer's obligations to an exclusive bargaining representative. In that case, no exclusive bargaining representative had been selected, and the case turned solely on the question whether the Board could properly find that a wage increase granted prior to a Board election was an unfair labor practice where the increase was not conditioned upon rejection of the Union in the election but was, as the Board found, offered to induce employees to vote against the Union.

[14] *Matter of Louisville Refining Co.*, 4 N. L. R. B. 844, 859–860; enforced, 102 F. 2d 678 (C. C. A. 6), certiorari denied, 308 U. S. 568; *Matter of Chicago Apparatus Co.*, 12 N. L. R. B. 1002, 1008–1012, enforced, 116 F. 2d 753, 756–759 (C. C. A. 7); *Matter of Whittier Mills Co.*, 15 N. L. R. B. 457, 465–466, enforced, 111 F. 2d 474, 478–479 (C. C. A. 5); *Matter of George P. Pilling & Son Co.*, 16 N. L. R. B. 650, 655–659, en-

These holdings comport with familiar principles of trade unionism under which it is axiomatic

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forced, 119 F. 2d 32, 36, 38 (C. C. A. 3); *Matter of Wilson & Co.*, 19 N. L. R. B. 990, 999–1000, enforced, 115 F. 2d 759, 763 (C. C. A. 8); *Matter of Oughton*, 20 N. L. R. B. 301, 318, enforced, 118 F. 2d 486, 494, 498 (C. C. A. 3), certiorari denied, 315 U. S. 797; *Matter of Inland Lime & Stone Co.*, 24 N. L. R. B. 758, 769–770, enforced, 119 F. 2d 20, 22 (C. C. A. 7); *Matter of Schmidt Baking Co.*, 27 N. L. R. B. 864, 868–870, enforced, 122 F. 2d 162 (C. C. A. 4); *Matter of Aluminum Ore Co.*, 39 N. L. R. B. 1286, 1295–1299, enforced, 131 F. 2d 485, 487 (C. C. A. 7); *Matter of Great Southern Trucking Co.*, 34 N. L. R. B. 1068, 1085, enforced, 127 F. 2d 180, 186 (C. C. A. 4), certiorari denied, 317 U. S. 652; *Matter of Barrett Co.*, 41 N. L. R. B. 1327, enforced, 135 F. 2d 959, 961 (C. C. A. 7); *Matter of Crown Can Co.*, 42 N. L. R. B. 1160, enforced, 138 F. 2d 263, 267 (C. C. A. 8), certiorari denied, 321 U. S. 769; *Matter of Consolidated Aircraft Corp.*, 47 N. L. R. B. 694, enforced, 141 F. 2d 785, 787 (C. C. A. 9); *Matter of South Carolina Granite Co.*, 58 N. L. R. B. 1448, 1462–1464 (unilateral employer application to War Labor Board for wage increase).

This is true even where the union has not yet approached the employer for collective bargaining conferences. *Matter of General Motors Corp.*, 59 N. L. R. B. 1143, enforced, 150 F. 2d 201 (C. C. A. 3); *Matter of Riverside Mfg. Co.*, 20 N. L. R. B. 394, 400–407, enforced, 119 F. 2d 302 (C. C. A. 5).

The New York State Labor Relations Board and the New York courts have similarly construed the obligation to bargain collectively under the New York Act as prohibiting unilateral changes of terms or conditions of employment after an exclusive bargaining representative has been selected. *New York State Labor Relations Board* v. *Montgomery Ward & Co., Inc.*, 179 Misc. 298, aff'd, 266 App. Div. 878, enforcing, 5 N. Y. S. L. R. B. 441, 448; *Matter of Union Club*, 6 N. Y. S. L. R. B. 137, 146–147; *Matter of Fraioli Flour Trucking Co.*, 6 N. Y. S. L. R. B. 539, 540; *Matter of Davy Jones Sea Food House, Inc.*, 5 N. Y. S. L. R. B. 1026, 1028.

that "collective bargaining requires negotiations prior to action by either party * * * any unilateral action is barred."[15] Just as the term "collective bargaining", as understood at the time Congress adopted it, implied a system requiring the reduction of agreements to writ-

[15] Chamberlain, Neil, *The Nature and Scope of Collective Bargaining*, Quarterly Journal of Economics, Vol. 58, No. 3 (May 1944), pp. 359, 375–376, 378. In the course of this discussion, at pp. 377–378, the author says: "Since the element of mutuality requires that each party negotiate with the other before taking any action in any field of joint concern [i. e., a subject matter appropriate for collective bargaining], it follows that direction of the collective bargaining process to particular issues does not rest solely with the union. Rather, the party wishing to alter the terms of relationship is the one obliged to notify the other of its wishes and to propose negotiations. The burden of initiating discussions on particular issues may thus rest with the employer, and this not only in those instances when he is seeking to curtail the union's prerogatives or its members' perquisites but also when he proposes to extend them. Once joint concern is established, any unilateral action is barred." [Explanatory matter in brackets added.] Professor Slichter succinctly states the principle in the form of advice to employers: "Don't 'short circuit' the union; if you recognize it, deal with it and through it. Make no announcements of labor policies without consulting it." Slichter, Sumner, H., *The Contents of Collective Agreements*, Society for the Advancement of Management Journal, Vol. 3, No. 1 (January, 1938), pp. 13, 19.

Dr. Leiserson, in 1920, analogized the obligations imposed upon employers and employees under the principles of collective bargaining to those of a partnership relation. "Partnership between labor and capital is coming to mean that the management or the owner of the business must look upon labor as the equal of the management. When

ing (*H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 524), so also did the term comprehend the principle that the representative must be consulted and afforded an opportunity to bargain before the employer effected any changes in the working conditions of employees in the unit.[16] From its very inception,

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we have such a partnership, two equal partners, then one partner cannot do anything without consulting the other partner. That is partnership. Moreover, these industrial representation plans, however imperfect they may be now, all tend to make labor and capital equal and partners in the business." Leiserson, William M., *The Meaning of Labor Representation*, Annals of the American Academy of Political and Social Science, Vol. 90 (July, 1920) p. 23. Two months later he expanded this theme. "Collective bargaining," he pointed out, "implies a questioning of the absolute authority of the management in governing the productive efforts of the employees.' It says there must be no rules or orders affecting the interests and welfare of the wage earners without the consent of those who must obey them." Leiserson, William M., *Collective Bargaining and Its Effect on Production*, Annals of the American Academy of Political and Social Science, Vol. 91 (September, 1920), p. 42. See also Daugherty, Carroll R., *Labor Problems in American Industry* (New York, 1941), p. 273.

[16] During the period prior to the passage of the Act when employees achieved collective bargaining, not as a right accorded by law, but as a result of their economic strength, they often insisted upon incorporating into collective agreements provisions expressly requiring joint consultation between union and management representatives as a condition precedent to the institution of any changes in the terms or conditions of employment. U. S. Bureau of Labor Statistics, Bull. No. 393, *Trade Agreements 1923 and 1924*, pp. 48, 50, 59, 60, 87; Bull. No. 419, *Trade Agreements 1925*, pp. 74, 83, 102, 104, 120; Bull. No. 448, *Trade*

trade unionism has regarded this principle as the essence of collective bargaining.[17] In the Railway Labor Act of 1926, as well as in the 1934 Act, Congress explicitly adopted this principle of collective bargaining which precludes the employer from changing rates of pay, rules or working conditions

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Agreements 1926, pp. 76, 95, Haber, W. G., *Workers' Rights and the Introduction of Machinery in the Men's Clothing Industry*, Journal of Political Economy, Vol. 33 (August, 1925), pp. 388, 404–405. Provisos of this type in effect reiterating the mutuality already implicit in the agreement, enabled the workers "to maintain their old standards of work and pay for all members of the group * * *" by prohibiting "changes except when a new collective bargain is made * * *". Hoxie, Robert F., *Trade Unionism In The United States* (New York, 1923), p. 290. See also Daugherty, Carroll R., *Labor Problems in American Industry* (Cambridge, 1936), p. 545; Mitchell, John, *Organized Labor* (Philadelphia, 1903), pp. 7–8.

[17] "* * * joint consideration and determination of the terms of employment are the essence of industrial democracy. Although the earlier councils introduced by the employer were not always permitted to deal with such controversial matters as wages and hours, the majority of contemporary works councils enjoy this power. Ever since its inception, of course, trade unionism has functioned in this sphere." Watkins, Gordon S. and Dodd, Paul A., *The Management of Labor Relations* (New York, 1938), pp. 694–695; Webb, Sidney and Beatrice, *Industrial Democracy* (London, 1920), pp. 217–218; Alexander, Magnus W., *Collective Bargaining—Some Fundamental Considerations*, Annals of the American Academy of Political and Social Science, Vol. 90 (July, 1920), pp. 61, 67; Gompers, Samuel, *Collective Bargaining* (Washington, D. C., 1920), p. 1; Woll, Mathew, *Labor, Industry and Government* (New York, 1935), p. 112; Bowne, Waldo D., *What's What in the Labor Movement* (New York, 1921), p. 75; Catlin, Warren B., *The Labor Problem* (New York, 1935), p. 424, describes collec-

except after notice to, and negotiation with, the union representing the employees affected.[18] The War Labor Board has recognized that the concept of collective bargaining requires that employers notify the exclusive representative even of proposed technological changes and afford the union an opportunity to discuss and negotiate concerning the matter before instituting the proposed change.[19] Experts in labor relations espouse this concept of collecting bargaining. Thus, representatives of labor have said that policies affecting

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tive bargaining as a system in which "The interests and predilections of the workers come to be consulted in making alterations of policy or changes in methods. The government of the business becomes at least a constitutional monarchy and may approach 'industrial democracy.'" See also, Watkins & Dodd, *op. cit. supra*, pp. 666–667.

[18] Section 6, 45 U. S. C. 156. For the 1926 Act, see 44 Stat. 582; the 1934 Act, 48 Stat. 1197. See Judge Hutcheson's statement in *Brotherhood of Railway & Steamship Clerks* v. *Texas & N. O. R. Co.*, 25 F. 2d 873, at 875–876 (S. D. Texas), aff'd, 281 U. S. 548, to the effect that the "guarantee granted to [the employees] by Congress," was "that his wages and working conditions shall not be fixed for him without representation."

[19] *In re Riverside and Dan River Cotton Mills, Inc.* [*Danville, Va.*] and *Pittsylvania County Joint Board, Textile Workers Union of America (C. I. O.)* Case No. 2664–CS–D (June 29, 1944), 16 War Lab. Rep. 663. Cf. *In re Douglas Aircraft Co., Inc.* [*Tulsa, Okla.*] and *International Association of Machinists, Lodge 842 (AFL)*, Case No. 111–12530–D, 17 L. R. R. 40, 41, in which the War Labor Board denied the company's request that it be permitted to change shift hours without prior notice to, and consultation with, the Union whenever such changes were directed by agencies of the United States Government.

terms and conditions of employment should "be worked out jointly in union management negotiations; that is the primary function of a union, and to side-step it, in whole or in part, almost certainly leads to industrial strife. The day when management in granting improved working conditions could beat its chest in philanthropic gusto is past; these things, and partial credit for them now belong to the unions."[20] And the executive Secretary of the University of Chicago's Industrial Relations Center recently pointed out that when the practice and procedure of collective bargaining has been accepted by management—

> The company recognizes that the setting of wage rates, the establishment of criteria for layoffs and advancement, the setting of production standards, and other matters falling within the scope of so-called management prerogatives affect workers as human beings, and, as human beings, workers want to be consulted about these matters and seek some voice in their determination. Companies which have accepted unions are usually convinced that the participation of workers through their unions in the determination of policies which affect them tends to increase efficiency and to strengthen rather than weaken management. Avoiding taking unilateral action in such matters, the manage-

[20] Golden, Clinton S., and Ruttenberg, Harold J., *The Dynamics of Industrial Democracy* (New York, 1942), pp. 102–103.

> ment banks on its leadership "ability" rather than its prerogatives to initiate action. It frankly acknowledges the role of the union in bringing about improvements in working conditions.[21]

So in a statute which "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States," *Order of Railroad Telegraphers* case, 321 U. S. at 346; see also *Heinz* case, 311 U. S. at 523–526, and just as individual bargaining is outlawed as the antithesis of collective bargaining (*supra*, pp. 20–21), unilateral settlement is necessarily outlawed as the antithesis of bargaining itself.[22] "The very

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[21] Harbison, Frederick H., *The Basis of Industrial Conflict*, Address, reprinted, 17 L. R. R. 34, 36 (Sept. 10, 1945).

[22] "The right of collective bargaining is wholly inconsistent with unilateral company action * * *." *Consolidated Aircraft Corp.* v. *National Labor Relations Board*, 141 F. 2d 785, 787 (C. C. A. 9). Wages "is a subject matter no longer to be unilaterally determined by the employer," *Singer Manufacturing Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 137 (C. C. A. 7), certiorari denied, 313 U. S. 595. See also *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C. C. A. 8).

The practice of individual bargaining, with which collective bargaining is typically contrasted, is, in practice, tantamount to unilateral employer determination of terms and conditions of employment. As early as 1898, this Court noted the fact that in dealings between the industrial employer and the individual employee, "the proprietors lay down the rules and the laborers are practically constrained to obey them" *Holden* v. *Hardy*, 169 U. S. 366, 397. As Bishop Francis Haas, a member of the National Labor Board established under Section 7 of the N. I. R. A.,

purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co.* v. *National* Labor Relations Board, 321 U. S. 332, 338. Terms imposed unilaterally by the employer, even more clearly than terms arrived at through individual bargaining, fail to meet this statutory standard.

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testified before a Senate Committee considering the Wagner Bill: "Customarily, the wage relationship prior to June 16, 1933, was referred to as an individual bargain. In point of fact, among the overwhelming number of 48,000,000 workers in the United States there was no bargaining whatsoever. * * * The great mass of workers were, at the time they were hired, simply told what they would get. Very frequently, they were not even told. After employment, when piece rates were changed, the foreman simply announced the new rates. He could announce rates as low as he chose, limited only by the shortage of workers standing ready to take jobs. Briefly the typical employer-employee relationship did not have even the appearance of trading or bargaining. The employer simply notified the worker what wages he was to get and the hours he was to work." Hearings, S. Committee on Education and Labor, S. 2926, 73d Cong., 2d Sess., pt. 1, p. 116. Compare the statement of Senator Wagner, 73d Cong., 2d Sess., pt. 1, p. 17: "I think it has been recognized that, due to our industrial growth, it is simply absurd to say that an individual, one of 10,000 workers, is on an equality with his employer in bargaining for his wages. The worker, if he does not submit to the employer's terms, faces ruin for his family. The so-called freedom of contract does not exist under these circumstances." See also, Daugherty, Carroll R., *Labor Problems in American Industry* (Cambridge, 1936), p. 413.

Unilateral employer action in disregard of the exclusive bargaining representative, as the Board has noted many times, constitutes a direct attack upon the entire process of self-organization.[23] Since "one of the primary motives for union membership is the desire of workers to have a voice in making the decisions that vitally affect their everyday lives,"[24] employer action which

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[23] See *supra*, note 14, pp. 23–24.

[24] Golden, Clinton S., and Ruttenberg, Harold, Jr., *The Dynamics of Industrial Democracy* (New York, 1942), p. 82; see also, *American Federation of Labor Reconstruction Program*, reprinted in Commons, John R., *Trade Unionism and Labor Problems* (Boston, 1921), 562, 563; Daugherty, Carroll R., *Labor Problems in American Industry* (New York, 1941), pp. 272, 273, 275, 284. Experts in personnel management recognize the deep seated psychological basis for this desire. "In all human affairs nothing so stirs up instant and severe resentment as action taken by someone which vitally concerns us and which he failed to discuss with us." Carey, H. H., *Consultative Supervision*, Nations Business (April, 1937), p. 44, and accompanying photograph.

As early as 1918, Mr. Justice Brandeis, speaking of the necessity of consulting and obtaining the approval of the workers before introducing changes in methods of production pointed out that "In a democratic community men who are to be affected by a proposed change of conditions should be consulted, and the innovators must carry the burden of convincing others at each stage in the process of change that what is being done is right." Brandeis, Louis D., *Efficiency by Consent*, Industrial Management (February, 1918), p. 108. See also, Leiserson, Wm. M., *The Meaning of Labor Representation*, Annals of the American Academy of Political and Social Science, Vol. 90 (July, 1920), pp. 22–23. "The real importance of collective bargaining consists in the fact that it offers wage-earners the opportunity to participate effectively in determining the conditions under which they work." Twentieth Century Fund, *Labor and the Government* (New York, 1935), pp. 5–6.

frustrates that desire necessarily discourages self-organization. The frustration in this case, as the Board pointed out, was particularly severe, for, "were the [petitioner] successful in obtaining approval of its proposed wage adjustments, under the circumstances of the war emergency, this might result in the Union being foreclosed for an indefinite period from effective bargaining with reference to the wages of employees for whom it had been certified as bargaining representative" (R. 52). By thus practically removing rates of pay, the most essential element in the employment relation, from the field of negotiation open to the Union, petitioner took the heart out of collective bargaining and destroyed *pro tanto* the value of union membership in the eyes of the employees.

Petitioner was here engaged in challenging the right of the employees to organize and bargain collectively altogether. Shortly before petitioner filed its application for approval of the wage increases, the Union had requested bargaining concerning wages (R. 193), and petitioner had flatly refused to bargain (R. 194). By thereafter deliberately ignoring the Union while deciding to increase wages $2 per week retroactive to September 3, 1943, and then informing the employees of its unilateral application to the War Labor Board for approval of the plan, petitioner, as in *Matter of Wilson & Co.*, 19 N. L. R. B. 990, 999, enforced, 115 F. 2d 759, 763 (C. C. A. 8), "dealt

a severe blow to the Union's prestige by demonstrating to the employees that [petitioner] considered collective bargaining with the Union neither desirable nor necessary." Petitioner carried its attack upon the Union still further. Soon after the Union had filed charges based in part upon petitioner's unilateral action, petitioner departed from its earlier announced intention not to discuss the matter further with the employees until word had been received from the War Labor Board concerning the progress of the application, and intimated in a speech over the store's public address system that the projected wage increase might be jeopardized if the Union took any steps to vindicate its position as bargaining agent (R. 189–190). "It was fairly inferable that the employer, by this action, intended to humiliate the Union representatives and discredit them in the eyes of their fellow employees." *Inland Lime and Stone Co.* v. *National Labor Relations Board*, 119 F. 2d 20, 22 (C. C. A. 7).

The Board's conclusions, sustained by the court below, that petitioner's actions may "reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation" finds support in the Board's experience. Such object lessons in the futility of self-organization and collective bargaining have often resulted in wholesale defection of union members. See, *e. g.*,

Oughton v. *National Labor Relations Board,* 118 F. 2d 486, 494, 498 (C. C. A. 3), certiorari denied, 315 U. S. 797; *National Labor Relations Board* v. *George P. Pilling & Son Co.,* 119 F. 2d 32, 38–39 (C. C. A. 3); *Matter of Riverside Manufacturing Company,* 20 N. L. R. B. 394, 400–407, enforced, 119 F. 2d 302 (C. C. A. 5); *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 687. Where unions have been recognized and collective bargaining agreements are in effect, similar autocratic action by employers, even though it conferred benefits upon the employees, has been productive of strikes.[25]

The alleged dilemma in which petitioner found itself, *i. e.,* of excluding the employees in the unit from its application and risking charges of discrimination, or withholding its application altogether and denying wage increases to all of its employees, was created by petitioner's determination to disregard its statutory obligations. Here, as in the *Medo* case, 321 U. S. 678, 686–687, "either consequence, as well as any violation of the Act, would * * * have been avoided, if the employer, as is its statutory duty," had recognized and bargained with the Union as it had with the electricians and other craft groups (*supra,* p. 10).

[25] Chamberlain, Neil, *op. cit. supra,* note 15, pp. 375-376, notes 3 and 4; Golden, Clinton S., and Ruttenberg, Harold J., *The Dynamics of Industrial Democracy* (New York, 1942), pp. 100–101; Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1942), pp. 553, 680–681, 799–800.

In declining to be guided by the Board's certification, petitioner acted at its peril. As the court below held, "the certificate is valid until declared invalid by the court or replaced by the Board. *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 4 Cir., 140 F. 2d 217, 222. The refusal of the employer to recognize the certificate does not excuse compliance * * *" (R. 272).[26] Petitioner contends in effect that its original unfair labor practice, the refusal to recognize or bargain with the Union, should be treated as immunizing it from the consequences of such further attacks upon the employees' right of self-organization as it might care to launch. But clearly each invasion of the rights of employees under the Act is a separate violation,[27] and it can hardly be contended that successive violations are to be ignored merely because all are predicated upon the same erroneous assumption that the em-

[26] *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. 2d 760, 764–766 (C. C. A. 7), certiorari denied, 313 U. S. 590; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 878–881 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Century Oxford Manufacturing Corp.*, 140 F. 2d 541 (C. C. A. 2), certiorari denied, 323 U. S. 714.

[27] See, *e. g.*, *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 334, 352, *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 684–685; *Consolidated Aircraft Corp.* v. *National Labor Relations Board*, 141 F. 2d 785 (C. C. A. 9).

ployees are not entitled to rights under the Act.[28] An unsuccessful attack upon a Board certification, like an unsuccessful attack upon the Board's jurisdiction, does not shield unfair labor practices from statutory sanctions.

Nor was petitioner required to engage in the additional unfair labor practices in order to maintain its right to challenge the Board's certification. Petitioner could have bargained with the Union concerning the proposed increase insofar as it concerned the employees in the unit and filed a joint application for a wage increase with the Union (see R. 196A),[29] while at the same time continuing to refuse to recognize the Union generally.

Instead, petitioner chose to place the Union in a genuine dilemma. The Union was compelled either to stand by and take the risk of losing its membership by acquiescing in wage increases concerning which it had no opportunity to bargain, or to request the War Labor Board not to consider petitioner's application for a wage increase

[28] *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. 2d 678, 680–681 (C. C. A. 6), certiorari denied, 308 U. S. 568; *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. 2d 753, 755–756, 758–759 (C. C. A. 7); *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. 2d 474, 477–479 (C. C. A. 5); *National Labor Relations Board* v. *Schmidt Baking Co., Inc.*, 122 F. 2d 162, 163–164 (C. C. A. 4).

[29] The regulations of the War Labor Board which provide for such joint applications are set forth in Appendix B, *infra*, pp. 79–81.

insofar as it affected the bushelmen.[30] To force an organization to either step is almost to compel its self-destruction as a collective bargaining representative. Moreover, by implying, in the address on September 14, 1943, that if the employees received the wage increase they would have only petitioner to thank, whereas if they did not receive it they would have only the Union to blame, petitioner created an apparent conflict of interest between the employees and the Union and brought home to the employees the dilemma in which the Union found itself as a result of petitioner's illegal conduct. To so condition employment benefits upon sacrifice by the employees of their right to take steps to vindicate self-organization and collective bargaining is to strike a potent blow at the rights themselves. Cf. *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 685–686.

II

THE BOARD HAD AUTHORITY TO INSERT, IN ITS ORDER, THE CEASE AND DESIST PROVISIONS SUSTAINED BY THE COURT BELOW

As we have shown (*supra*, pp. 10–13, 20–38), the Board properly found that petitioner (1) "by its

[30] The Union took the latter course. On October 12, 1943, it filed objections with the Regional War Labor Board to the processing of petitioner's application insofar as it affected the employees in the unit. On October 14, 1943, the Regional Board accordingly, in view of the petitioner's request (see *supra*, p. 11), eliminated the bushelmen from the application. In re *May Department Stores Co.*, N. W. L. B. Case No. 7–6585 (unreported).

unilateral action in seeking approval of its proposed wage adjustments" (R. 53), and (2) "by statements of its officers and its publication Store Chat addressed to employees concerning said unilateral action" (R. 53), violated Section 8 (1) of the Act (R. 54). Translating this finding into the statutory terms, it appears that the Board found that petitioner had interfered with, restrained, and coerced its employees in the exercise of their

> right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> [R. 53, Sections 8 (1) and 7, Appendix, A, infra, p. 76.]

Section 10 (a) of the Act (Appendix A, *infra*, pp. ~~76-77~~ 77-78) empowers the Board "to prevent any person from engaging in any unfair labor practice (listed in Section 8)", and Section 10 (c) authorizes the Board to issue and cause to be served on the employer found to have committed "any such unfair labor practice" "an order requiring such person to cease and desist from such unfair labor practice." (Appendix A, *infra*, p. 78.)

Consequently, the Board, having found that petitioner had "refused to bargain collectively with the Union" (R. 51), ordered petitioner to "Cease and desist from: (a) Refusing to bargain

collectively" with the Union (R. 45–46). Having in addition, found that petitioner had violated Section 8 (1) in the manner set out above and by its refusal to bargain, the Board order (R. 46), as modified (R. 285), required petitioner to "Cease and desist from:"

> (b) In any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1 (a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

Despite the fact that in paragraph 1 (b) of its order, the Board literally complied with the statutory command to enjoin "such unfair labor practice"—the violation of Section 8 (1)—petitioner challenges that part of the order on the ground that it restrains "the Petitioner from acts which it is not claimed that Petitioner committed. And there is no basis in Petitioner's past conduct to suggest that other violations of the Act should be anticipated" (Br. 47–48).

National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426, is the leading authority invoked by petitioner and to which we

turn in assessing petitioner's challenge to paragraph 1 (b) of the Board's order. In that case, the Fifth Circuit Court of Appeals had set aside the Board's finding that the company had violated Section 8 (1) by making certain statements to its employees. See 312 U. S. at 428, note 1; and 441, note 2, in the dissenting opinion. All that remained to support the Board's order, worded in terms substantially like those of paragraph 1 (b) of the order in the instant case, was the finding that the company had refused to bargain with the union; had, therefore, violated Section 8 (5), Appendix A, *infra*, p. 76; and had, therefore, also violated Section 8 (1). This Court held that the violation of Section 8 (5) was merely a "technical violation" of Section 8 (1), and that that type of Section 8 (1) violation did not warrant a broad order to cease and desist from violating Section 8 (1).

But here, the Board found an independent, serious, and far-reaching violation of Section 8 (1), quite apart from the refusal of petitioner to bargain. See *supra*, pp. 10, 13, 20–38. Hence, this Court's decision in the *Express Publishing* case, as the court below held (R. 269), does not stand in the way of paragraph 1 (b) of the order in this case.

Significantly, petitioner nowhere proposes a substitute for the order enforced by the court below. This is not surprising, for a consideration

of the conceivable alternatives compels the conclusion that the order, as it stands, is neither too broad nor defective in any other way, but is an appropriate exercise of the Board's remedial powers. While there are infinite variations in the alternative orders which logically might be considered appropriate, they roughly fall into four categories: (1) An order which merely enjoins a repetition of the specific acts committed, as for instance that petitioner shall not grant further wage increases to its employees without giving notice to the Union and affording the Union an opportunity to negotiate, and shall not issue written or oral statements to its employees concerning wage increases about which it has not negotiated or offered to negotiate with the Union. The possible variations of such an order are suggested by such problems as whether the order should be narrower and merely enjoin further unilateral applications to the War Labor Board or should be broader and also enjoin unilateral changes in hours and other conditions of employment. (2) An order which enjoins the employer from "interfering with" employees in the exercise of the rights guaranteed in Section 7 but does not use the terms "restraining or coercing." (3) An order which enjoins the employer merely with respect to the right to collective bargaining (which petitioner concedes it has infringed if the certification was valid), or merely with respect to the rights to self-organization and to bargain collec-

tively (the two rights most obviously invaded if any distinction can be made in this context), but does not, in terms, include the other rights listed in Section 7 of the Act. (4) An order which enjoins the employer from interfering with the efforts of a given union to organize his employees or to bargain with him on their behalf, or which enjoins an employer from interfering with his employees in their efforts to join or utilize the bargaining facilities of a particular union, rather than one which protects the employees' rights irrespective of the union through which they choose to bargain.

Any argument that the order should be limited merely to a prohibition of a repetition of the specific acts committed rather than to a prohibition of the type of unfair labor practice committed is precluded by this Court's decision in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 439. In that case, the Circuit Court of Appeals for the Fifth Circuit struck entirely a paragraph of a Board order worded in terms substantially like those used in paragraph 1 (b) of the order in the instant case. This Court restored part of the stricken language by directing that the court enter a decree which required the employer to cease and desist from "in any manner interfering with the efforts of the [union] to bargain collectively with the" employer, and did not limit the order to interference by a repetition of specific conduct theretofore engaged in by the

employer which had been found to constitute interference, namely the refusal to bargain. Nor did the Court contemplate that only interference by the method theretofore used could be regarded as contempt, for it pointed out that a "discriminatory discharge of union members may so affect the bargaining process as to establish a violation of the order" (312 U. S. at 437). The Court summarized the general equity rule in the federal courts: "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past" (312 U. S. at 435). Previously, adapting general equity practice to enforcement of the rights to self-organization guaranteed in the Railway Labor Act, this Court had sustained a contempt adjudication based on discriminatory discharges where the original injunction order was worded similarly to paragraph 1 (b) of the instant decree and had been based on acts of domination of a company union. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 555–556. This Court, in that case, rejected contentions of the employer that the contempt adjudication was based on acts unrelated to those giving rise to the injunction and that the injunctions as so interpreted were framed in such general language "that they [kept] petitioners

in constant jeopardy of contempt with no basis for determining what action in the management and operation of the railroad may be a violation of the injunction" (281 U. S. at 552, 571).[31]

The language of Section 10 of the Act (Appendix A, *infra*, pp. 76-77) has, until recently, uniformly been construed by the circuit courts of appeals as evidencing a Congressional intent that Board orders be framed to prohibit all unfair labor practices of the type or class committed, and not merely the repetition of the precise form of acts previously committed or the commission of substantially identical acts. Referring to this language, the Circuit Court of Appeals for the Ninth Circuit has said:[32]

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[31] For the converse situation, see *National Labor Relations Board* v. *Arcade-Sunshine Co., Inc.*, 122 F. 2d 964–965 (App. D. C.). That case involved contempt proceedings arising under a paragraph of a decree which was worded much like paragraph 1 (b) of the order in the instant case. The decree was based on discriminatory discharges and other interferences, and the employer's acts in establishing a company union were held "so related in their general nature to those enjoined in our decree as to make evidence in relation to them relevant." Cf. *National Labor Relations Board* v. *American Mfg. Co., Inc.*, 132 F. 2d 740 (C. C. A. 5), certiorari denied, 319 U. S. 743; *Reliance Mfg. Co.* v. *National Labor Relations Board*, 143 F. 2d 761 (C. C. A. 7); *National Labor Relations Board* v. *Lowenstein & Sons*, 121 F. 2d 673, 674 (C. C. A. 2).

[32] *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. 2d 652, 660–661 (C. C. A. 9). See also *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 647–648 (App. D. C.); *National Labor Relations*

When the Board has made a finding, supported by substantial evidence, that an act has been done which is prohibited as an unfair labor practice, the fair intent of the statute is that the Board is warranted in ordering desistance from such an unfair labor practice generally and is not required to limit its order so as to compel cessation only of the particular and limited activity found to have taken place.

* * * Had Congress intended that the Board should be limited to requiring desistance from the particular mode found by

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Board v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 890–891 (C. C. A. 1), certiorari denied, 313 U. S. 595; *Sperry Gyroscope Co., Inc.* v. *National Labor Relations Board*, 129 F. 2d 922, 931 (C. C. A. 2); *National Labor Relations Board* v. *T. W. Phillips Gas & Oil Co.*, 141 F. 2d 304, 306 (C. C. A. 4); *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. C. A. 4); *National Labor Relations Board* v. *Bersted Mfg. Co.*, 124 F. 2d 409, 412 (C. C. A. 6), denying rehearing and modifying, 128 F. 2d 738; *National Labor Relations Board* v. *Continental Oil Co.*, 121 F. 2d 120, 125–126 (C. C. A. 10). See also petition for a writ of certiorari in *National Labor Relations Board* v. *Cheney California Lumber Co.*, No. 319, this Term, pp. 17–21.

Four circuits have recently taken the other view. See *General Motors Corporation* v. *National Labor Relations Board*, 150 F. 2d 201 (C. C. A. 3); *National Labor Relations Board* v. *Lipshutz*, 149 F. 2d 141 (C. C. A. 5); *Le Tourneau Company of Georgia* v. *National Labor Relations Board*, Case No. 10954 (C. C. A. 5); *National Labor Relations Board* v. *Serrel, Inc.*, 149 F. 2d 542 (C. C. A. 7); *National Labor Relations Board* v. *Cowell Portland Cement Co.*, 148 F. 2d 237 (C. C. A. 9), petition for a writ of certiorari filed, No. 231, this Term; *National Labor Relations Board* v. *Cheney California Lumber Company*, 149 F. 2d 333 (C. C. A. 9), petition for a writ of certiorari filed, No. 319, this Term.

> the Board to have been followed in the past by the employer to accomplish a particular unfair labor practice no doubt it would have been provided that the Board should order desistance from the *act* by which the unfair labor practice was perpetrated. It is probable that Congress refrained from such limitation of the Board's authority as is here suggested in consideration of the evident fact that the methods by which a given unfair labor practice may be committed are so varied and numerous that the protection granted to employees by the Act would be largely ineffectual if each variation on the same theme necessitated a separate hearing and a specific prohibitory order.

This construction of the statute is reenforced by an examination of the statutory scheme for enforcement. Since the only sanction provided is the injunctive decree and contempt proceedings based thereon, unless the lengthy proceedings before the Board and the courts, which always precede any injunctive decree, result in an order broad enough to protect the right invaded, the Act will bog down in procedural delays. "The act would be ineffectual if each new example of interference, domination, etc., required a new hearing and a new order." *Bethlehem Steel Co.* v. *National Labor Relations Board,* 120 F. 2d 641, 647–648 (App. D. C.). The legislative history of the enforcement provisions of the Act makes it clear

that Congress did not intend to give an employer who had violated the Act a "second free bite at the apple." See Note (1940) 53 Harv. L. Rev. 472, 473. It was not anticipated, for example, that the Board would be denied enforcement of its orders simply because it had not shown that the employer could be expected again to commit unfair labor practices in the future. As the conference report on the bill which became the Act states (H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5):

> neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated, will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings.

It is apparent from this history and from the Act itself (see *supra*, pp. 39–40) that Congress intended enforcement orders to be broad enough to insure that any further violations of the Act falling within the same statutory classification as the practice already committed would be punishable as a violation of the decree. It was not contemplated that the burden would be on the Board to prove that there was a threat of resumption, either of the specific practice found to have been committed or related unfair labor practices. Congress

made the legislative judgment that one violation of the Act was likely to lead to others.

An order which, in addition to restraining the identical form of act previously committed, also restrains substantially identical acts, is likewise inadequate. Here the petitioner's three unfair labor practices all stemmed from its opposition to collective bargaining by the bushelmen as a group (R. 194–195). Until the court forced the petitioner to recognize the rights of the bushelmen as an appropriate bargaining group, petitioner was obviously not going to observe these rights. That its previous failure to observe these rights happened to take the form of unilateral wage increases affords no reason to suppose that if there were future infringements, they would take a substantially identical form. For this reason, the order should enjoin all invasions of the rights granted to the bushelmen by Section 7, and not merely infringement by unilateral action.

Cases decided under other statutes which contemplate the use of injunctive orders to secure compliance support the view that the injunction issued against the person violating a statute may restrain the fundamental violation—the interference with self-organization and collective bargaining in the instant case—and need not be limited to the specific illegal method employed at the time—the unilateral wage increase, the written and oral statements, and refusal to bargain collectively in the case at bar. When the Board

frames its order, "doubts should be resolved in favor of the Government and against the [party violating the statute]." *Local 167, International Brotherhood of Teamsters* v. *United States*, 291 U. S. 293, 299. The "order to cease and desist should be broad and inclusive enough to *stop* the practices at once and for all time" (*Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 329–330 (C. C. A. 7), certiorari denied, 323 U. S. 730), "broad enough to prevent evasion" (*Local 167* case, *supra* at 299), " 'to suppress the unlawful practices' and preclude their revival." *Union Pacific Railroad Co.* v. *United States*, 313 U. S. 450, 470. See *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 727 (Sherman Anti-Trust Act—"a mere prohibition of the precise scheme would be ineffectual to prevent restraints"); *Hill* v. *Federal Trade Commission*, 124 F. 2d. 104, 106 (C. C. A. 5); *Keller* v. *Federal Trade Commission*, 132 F. 2d 59, 61 (C. C. A. 7); *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968, 971–972 (C. C. A. 3) ("To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested."); *Interstate Commerce Commission* v. *Keeshin Motor Express Co., Inc.*, 134 F. 2d 228, 231–232 (C. C. A. 7), certiorari denied, 320 U. S. 738.

The Board, from the beginning, adopted the practice of entering orders which were worded in the specific terms of the Sections of the Act

violated. See *Matter of Pennsylvania Greyhound Lines, Inc.*, 1 N. L. R. B. 1, 51, enforced in this respect, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 91 F. 2d 178 (C. C. A. 3), reversed in other respects, 303 U. S. 261. This practice has been followed by state labor relations boards.[33] The Federal Trade Commission likewise has entered its orders in a form broad enough to prohibit the general practice of which the specific conduct in question is an example, rather than limiting its order to the precise misrepresentation, or unfair conduct, or improper practice, found. For instance, where there had been the payment of secret commissions to an employee of a single customer, the Commission held the company guilty of commercial bribery and issued an order to cease and desist from that practice in general.[34]

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[33] See, *e. g.*, *Matter of Charles C. Loehmann Corp.*, 6 N. Y. S. L. R. B. 26–41; *Matter of Bishop, McCormick and Bishop*, 6 N. Y. S. L. R. B. 73, 88; *Folding Furniture Works, Inc.* v. *Wisconsin Labor Relations Board*, 232 Wis. 170.

[34] *Federal Trade Commission* v. *Rockford Varnish Co.*, Docket No. 41. The complaint, findings, and order are not published, the case being merely referred to in a footnote in 1 F. T. C. D. 105; *Federal Trade Commission* v. *Raeder, Adamson Co.*, 4 F. T. C. D. 129. In *Federal Trade Commission* v. *The Oakes Co.*, 3 F. T. C. D. 36, upon a showing of commercial espionage against one competitor the order prohibited the practice in general. Cf. *Federal Trade Commission* v. *Boston Piano & Music Co.*, 3 F. T. C. D. 168, par. 3 of order. See a discussion of this problem in Henderson, Gerard C., *The Federal Trade Commission* (1924), pp. 72–77.

In view of this uniform administrative practice, which clearly comports with the Congressional intention and has been accepted by the courts, any contention that paragraph 1 (b) of the order in the instant case should be modified by restricting it to a prohibition of unilateral changes in wages or other terms of employment, or written or oral statements to employees respecting such changes, or substantially identical acts, must be rejected.

The possibility of modifying the order by eliminating the words "restraining or coercing," must also be rejected. Since an order to cease interfering would be violated by any act of restraint or coercion, eliminating these words from the order would not actually limit the scope of the order in any respect. Every act which would be contemptuous under the order with those words retained would likewise be contemptuous under the order with those words eliminated. Such a modification would merely tend to mislead the employer respecting his duties under the order.

The possibility of modifying the order to eliminate some of the rights listed as protected against interference in the future may seem to be the most plausible at first glance, for in the *Express Publishing* case, this Court made that form of modification, striking from the order a reference to all the rights listed in Section 7 of the Act except the right to collective bargaining. As we have shown, however (*supra*, pp. 40–41), this case is substantially different. In the *Express Pub-*

lishing case, the employer's only violation of the Act had been its refusal to bargain collectively. Nevertheless, this Court recognized that even a refusal to bargain collectively might warrant an order protecting all the rights listed in Section 7 of the Act, if the Board had made a "finding based either on the specific circumstances disclosed by the record or on its own expert judgment of their [the acts constituting the refusal to bargain] relation to the policy embodied in § 7, or as to any relationship or probable relationship of respondent's refusal to bargain and the other types of unfair labor practices some of which are enumerated in § 8" (312 U. S. at 434). In the instant case, the Board not only found two distinct violations of Section 8 (1) of the Act, but showed the relationship between the company's unfair labor practices and all the rights listed in Section 7.

It is clear that the "right of self-organization" cannot be eliminated from the order, because the Board found that petitioner had interfered with the exercise of that right by "nullifying [the Union's] efficacy as a bargaining agent" (R. 52) and by acts and statements which placed the employees in a position of abandoning either collective bargaining about wages for an indefinite period or the wage increase (R. 52). The "right to form, join, or assist labor organizations," was similarly interfered with by this conduct which "discouraged employees generally in their union

affiliation" (R. 52.) And the "right to bargain collectively through representatives of their own choosing" was infringed not only by the refusal to bargain but also by the unilateral action respecting the wage increases. Finally, it is apparent that, for the same reasons, the "right to engage in concerted activities, for the purpose of collective bargaining or other mutual aid and protection" was also transgressed."[35] These are the sum and

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[35] The Board has often found that acts of an employer by which employees are led to believe that their employer will not allow them to achieve any benefits through collective bargaining are violative of each of the rights guaranteed by Section 7. An employer's statement to his employees "that collective bargaining would fail, if undertaken as to major purposes" was held by the Board to "constitute an anticipatory denial of possible advantages to be derived from collective bargaining" and to be "obstructive of the employee's rights to self-organization." *Matter of J. Allen Smith & Co.*, 27 N. L. R. B. 1386, 1390-1391. "Were the Act to sanction such notice by the employer, he could with equal impunity further forestall and defeat union organization by announcing to his employees that under no circumstances would he recognize seniority among his employees for the purpose of lay-offs, that under no circumstances would he consider a change in the hours of employment, that under no circumstances would he consider *any* change in any other term or condition of employment. In effect, at the outset of union organization he could discourage his employees from becoming members by warning them that any possible advantage to be derived from such membership and from collective bargaining was beyond their reach. We cannot permit the purposes of the Act to be so flouted. In the light of all the evidence we find that the notice had the sole purpose of anticipating and denying to employees a possible advantage to be derived from collective bargaining negotiations. As such it amounted to discouragement of member-

substance of the rights protected by paragraph 1 (b) of the order.[36]

The legislative history of the Act itself supports the Board's conclusions in this case with respect to the relationship between what petitioner did and the rights granted by Section 7. The Senate Report on the bill that became the Act described the bill as "encouraging the practice

ship in the Union." *Matter of Roberti Bros., Inc.*, 8 N. L. R. B. 925, 929. See also *Matter of Gulf Public Service Co.*, 18 N. L. R. B. 562, 580–581; *Matter of Continental Box Co., Inc.*, 19 N. L. R. B. 860, 865–866; *Matter of Blossom Products Corp.*, 20 N. L. R. B. 335, 338–340; *Matter of Hawk & Buck Co.*, 25 N. L. R. B. 837, 840–842; *Matter of Bemis Bros. Bag Co.*, 28 N. L. R. B. 430, 434–436; *Matter of Columbian Iron Works*, 43 N. L. R. B. 73, 78–81.

[36] The attempt of courts to eliminate from their orders one or more of the rights listed in Section 7 has given rise to a great deal of confusion and inconsistency in practice. In *National Labor Relations Board* v. *Pacific Gas & Electric Co.*, 118 F. 2d 780, 789–791 (C. C. A. 9), the court stated that this Court's decision in the *Express Publishing* case was "not free from doubt" but apparently required that in a case which involved only a violation of Section 8 (1) there be omitted from the order any reference to the right "to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection." The same circuit has recently, in a case involving, as to one respondent, only violations of Section 8 (2) of the Act (and the violation of Section 8 (1) involved in the Section 8 (2) violation), left in the order a reference to all the rights mentioned in Section 7 except the right to engage in concerted activities for "other mutual aid and protection". *National Labor Relations Board* v. *Morris P. Kirk & Son, Inc.*, decided August 30, 1945 (C. C. A. 9),

of collective bargaining and protecting the rights upon which it is based." S. Rep. No. 573, 74th Cong., 1st Sess., p. 6. See also H. Rep. No. 1147, 74th Cong., 1st Sess., p. 8. These reports make it clear that the guaranties of Sections 7 and 8 (1) are not limited or restricted by the enumeration of unfair labor practices in the other subsections of Section 8; those subsections merely "spell out with particularity some of the practices that have been most prevalent and most troublesome." S. Rep. No. 573, 74th Cong., 1st Sess., p. 9; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 7, 15, 17; *Art Metals Construction Co.* v. *National Labor Relations Board*, 110 F. 2d 148, 150–151 (C. C. A. 2); *National Labor Relations Board* v. *Newark*

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modifying and enforcing 41 N. L. R. B. 807, 840–842. In *National Labor Relations Board* v. *Youngstown Mines Corp.*, 123 F. 2d 178, 181, 182 (C. C. A. 8), involving violations of only Section 8 (1) and (2), the court modified the order to read substantially as follows "In any manner interfering with, restraining, or coercing their employees in the exercise of their right to bargain collectively through representatives of their own choosing, and to engage in concerted activity for the purpose of collective bargaining, as guaranteed in § 7 of the National Labor Relations Act." See also *National Labor Relations Board* v. *Grower-Shipper Vegetable Ass'n*, 122 F. 2d 368, 377 (C. C. A. 9); *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 139–140 (C. C. A. 7), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Continental Oil Co.*, 121 F. 2d 120, 125–126 (C. C. A. 10); *Canyon Corp.* v. *National Labor Relations Board*, 128 F. 2d 953, 956–957 (C. C. A. 8).

Morning Ledger Co. 120 F. 2d 262, 265, 266–267 (C. C. A. 3), certiorari denied, 314 U. S. 693. See National Labor Relations Board, *Sixth Annual Report* (1942), pp. 87–88.

The right protected by the National Labor Relations Act is specific and relatively narrow. A prohibition against "in any manner" interfering with that right does not place the employer at the peril of a summons for contempt for engaging in various types of unrelated conduct. He need only refrain from interfering with, restraining, or coercing his employees in the exercise of the right to self-organization and collective bargaining. While there are myriad and diverse ways of interfering with that right, it is, on the whole, a very simple right, and generally it does not require ingenuity to refrain from such interference. In the rare case where the employer has been in genuine doubt as to his obligations, criminal contempt would clearly be unavailable since the element of wilfulness would be absent. Civil contempt proceedings could be instituted only by the Board, and it, in the first instance, and then the court, if contempt proceedings were instituted, would take the employer's good faith into consideration in fashioning a remedy. See *McCrone v. United States*, 307 U. S. 61, 64; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441–442.

The other statutes under which this Court has

limited the scope of injunctions[37] are less specific than the National Labor Relations Act. For example, "unlike the Federal Trade Commission Act,[38] which deals somewhat analogously with unfair trade practices, this bill [the National Labor Relations Act] is specific in its terms." S. Rep. No. 573, 74th Cong., 1st Sess., p. 8; *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. 2d 652, 661; cf. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427–428. The Sherman Anti-Trust Act[39] and the Interstate Commerce Act[40] are similarly distinguishable from the National Labor Relations Act. See Linkoff, *National Labor Relations Board—Limitation upon the Use of "Blanket Order"* (1941), 29 Geo. L. J. 1026, 1030; Note (1940) 53 Harv. L. Rev. 472, 475–476. Even under the Sherman Act, broad injunctions have, however, been upheld. *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 79–81; *Local 167, International Brotherhood of Teamsters* v. *United States*, 291 U. S. 293, 299; Note (1941) 54 Yale L. J. 141, 142.[41] It would be strange, indeed, if the Board,

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[37] *E.g.*, *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 455–457; *Swift & Co.* v. *United States*, 196 U. S. 375, 396, 402; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 404.

[38] 38 Stat. 719, 52 Stat. 111, 1,028, 15 U. S. C. 45.

[39] 26 Stat. 209, 15 U. S. C. 1–4.

[40] 32 Stat. 847, 34 Stat. 587, 49 U. S. C. 41.

[41] In the *Standard Oil* case, the injunction prohibited the defendants "from in any way conspiring or combining to

charged with protecting the public interest and operating under a statute of limited scope, were more stringently confined.

The fourth possibility of modification is also suggested by the change made in the *Express Publishing* case. There this Court substituted for the provision requiring the employer to cease interfering with its employees in the exercise of their right to collective bargaining, a provision requiring the employer to cease interfering with the efforts of the Newspaper Guild to bargain collectively. This form of modification has on occasion been adopted by the circuit courts of appeals but only in cases involving no unfair labor practice other than a refusal to bargain collectively.[42] Four circuit courts of appeals, on the other hand, have modified Board orders by inserting in the notice after the reference to the union involved in the case words such as "or any other

violate the [Sherman Anti-Trust] act." In the *Local 167* case, the decree enjoined the defendants "from using any of the offices or positions in Local 167 * * * 'for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof.'"

[42] See, for example, *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 139–140 (C. C. A. 7), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Calumet Steel Division of Borg-Warner Corp.*, 121 F. 2d 366, 371 (C. C. A. 7). For a case involving discriminatory discharges where the court refused thus to limit the order, see *Canyon Corp.* v. *National Labor Relations Board*, 128 F. 2d 953, 956 (C. C. A. 8).

labor organization of their choice." [48] This Court, in the *Express Publishing* case, did not discuss this modification and this issue, like the entire modification issue, had been briefed by neither of the parties.

The Board and the courts have uniformly treated the Act as conferring no rights on unions but solely on employees.[49] It would, therefore, seem to be improper to word the injunction in terms which protect the union from interference rather than the employee. Furthermore, since it is the em-

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[48] *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 51 (C. C. A. 3); *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. 2d 494, 499 (C. C. A. 3); *National Labor Relations Board* v. *American Rolling Mill Co.*, 126 F. 2d 38, 42 (C. C. A. 6); *National Labor Relations Board* v. *Cleveland Cliffs Iron Co.*, 133 F. 2d 295, 302 (C. C. A. 6); *Reliance Mfg. Co.* v. *National Labor Relations Board*, 125 F. 2d 311, 322 (C. C. A. 7); *Butler Bros.* v. *National Labor Relations Board*, 134 F. 2d 981, 985 (C. C. A. 7), certiorari denied, 320 U. S. 789; *Cudahy Packing Co.* v. *National Labor Relations Board*, 102 F. 2d 745, 753 (C. C. A. 8); *National Labor Relations Board* v. *Harbison Walker Refractories Co.*, 135 F. 2d 837, 839–840 (C. C. A. 8).

[49] "* * * the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the *employees* rather than as a grant of power to the union." *National Labor Relations Board* v. *Schwartz*, 146 F. 2d 773, 774 (C. C. A. 5).

ployees who have the right to self-organization and collective bargaining, and the union plays a part in the statutory scheme solely as an instrument which the employees utilize to achieve the statutory objectives, the order should not be limited to the protection of the employees' right to join and take advantage of the representation facilities of a particular union. An employer who opposes his employees' exercise of their right to collective bargaining commonly opposes these employees' freedom of choice with respect to other unions.[45] The order should therefore protect his employees in the exercise of their rights without limitation to their exercise through a given union.

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[45] In other cases, the Board found that petitioner had committed unfair labor practices where its employees had joined other unions. *Matter of May Company*, 38 N. L. R. B. 1154 (A. F. of L.—Warehouse Employees Union); *Matter of May Department Stores Co.*, 61 N. L. R. B. No. 258 (A. F. of L.—Elevator Operators and Starters). See also, 59 N. L. R. B. 976. Cases in which other employers opposed each of several successive unions which his employees sought to utilize as their agent for collective bargaining: *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 274; *Matter of Peyton Packing Co.*, 49 N. L. R. B. 828, enforced, 142 F. 2d 1009 (C. C. A. 5), certiorari denied, 323 U. S. 730; *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240 (C. C. A. 7), certiorari denied, 320 U. S. 746; *Matter of Kaye Metal Products Co., Inc.*, 42 N. L. R. B. 119, 124–150, 51 N. L. R. B. 621, 623–626, enforced, 134 F. 2d 954 (C. C. A. 2), certiorari denied, 322 U. S. 728.

III

THE BOARD COULD PROPERLY FIND THAT THE EMPLOYEES IN PETITIONER'S BUSHELING ROOMS CONSTITUTE A UNIT APPROPRIATE FOR COLLECTIVE BARGAINING

Thus far we have dealt with the issues arising out of petitioner's challenge to the Board's finding that it had violated Section 8 (1) of the Act and its challenge to the scope of the order. We now turn, in this point and in the next, to the underlying question as to the validity of the certification.

The governing statutory standard for the Board's guidance in unit determinations is "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act." Section 9 (b), Appendix A, *infra*, p. 75. In investing the Board with this function, Congress did not restrict the Board to the use of inflexible rules; designation of the appropriate unit is "obviously one for determination in each individual case" (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22). The power committed to the Board is, therefore, a broad discretionary one, the exercise of which is final, unless clearly arbitrary or capricious. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 113 F. 2d 698, 701 (C. C. A. 8), affirmed, 313 U. S. 146; *International Association of Machinists* v. *National Labor Relations Board*, 110 F. 2d 29, 46 (App.

D. C.), affirmed, 311 U. S. 72; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 880 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 247–248 (C. C. A. 9). The Board's determination in the instant case that the bushelmen constitute an appropriate bargaining unit was a proper exercise of the Board's discretion and is in no sense arbitrary.

The evidence relating to the work of the bushelmen (*supra*, pp. 4–5) plainly establishes that their functional homogeneity justifies grouping them separately for bargaining purposes. A further consideration, relied upon by the Board, emphasizes the propriety of the Board's grouping. The bushelmen were fully organized and had expressed a desire to be represented in a separate unit, and no labor organization claimed to represent petitioner's employees on a more comprehensive scale. Where other factors are favorable, the Board, as in the instant case, follows the salutary policy of permitting immediate access to the Act's machinery to small, fully organized groups of employees with mutual interests in the subject matter of collective bargaining.

As early as 1937, the Board stressed the "extent or organization" factor in its unit determinations as an important consideration in giving effect to the policies of the Act. *Matter of R. C. A. Communications, Inc.*, 2 N. L. R. B. 1109, 1115; *Matter of Gulf Oil Corp.*, 4 N. L. R. B.

133, 137. The "extent of organization" principle has since been reiterated by the Board in a long series of decisions [46] and has received judicial approval. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 132–135; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 880–881 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 247–248 (C. C. A. 9).

The soundness of the doctrine in question as a means of "encouraging the practice and procedure" of collective bargaining" (National Labor Relations Act, Section 1) is amply demonstrated. Had the Board dismissed the Union's petition for certification, a group of employees, seeking to bargain collectively, would have been denied the opportunity of utilizing the machinery of the Act for the solution of their problems until such indefinite time in the future as the employees of the entire store should become organized.[47]

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[46] *E. g.*, *Matter of Swift & Co.*, 42 N. L. R. B. 1184, 1186–1187; *Matter of Pacific Gas & Electric Co.*, 44 N. L. R. B. 665, 670–671; *Matter of M. D. Baldwin, et al. d/b/a Oliver Machinery Co.*, 47 N. L. R. B. 440, 442–443, enforced without opinion, December 16, 1943, 13 L. R. R. 641 (C. C. A. 6); *Matter of Gardner-Richardson Co.*, 52 N. L. R. B. 1260, 1262–1263; *Matter of Richmond Greyhound Lines, Inc.*, 52 N. L. R. B. 1532, 1534; *Matter of The J. L. Hudson Co.*, 56 N. L. R. B. 406, 408–410. See *supra*, note 6, p. 7.

[47] Only a few months prior to the instant proceeding, the Board in *Matter of May Department Stores*, 46 N. L. R. B. 305, dismissed a petition for investigation of representa-

Surely an employer's asserted inconvenience in bargaining with such a unit is no justification for such an unjust result, for in such a situation the employer "'does not consider it impractical to bargain with every single employee separately.'"[47] *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 880 (C. C. A. 3), certiorari denied, 319 U. S. 751, quoting *Matter of The Warfield Co.*, 6 N. L. R. B. 58, 64. Nor may the unit which application of this principle creates be challenged solely because an industrial store-wide unit might eventually be more desirable. A bargaining unit is not rendered improper merely because further organization and maturity of bargaining relations might make a

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tives on the ground that no labor union organizing employees in the Famous-Barr store and involved in that proceeding had made a substantial showing of representation of employees in a store-wide unit. The propriety of a craft unit was not in issue, and the Board's determination that an industrial unit would be appropriate does not foreclose its finding that a craft unit is also appropriate when the industrial unit is not organized. (See note 49, *infra*, p. 66. Subsequent to the certification and refusal to bargain in the instant case, the Board entertained a petition and directed an election in a storewide unit, excluding bushelmen. 54 N. L. R. B. 230. This election was later set aside upon the Board's findings of unfair labor practices committed by petitioner. 61 N. L. R. B., No. 258.

[47] For more than 20 years, petitioner has been bargaining and contracting with numerous craft unions representing teamsters, electricians, carpenters, painters, and upholsterers. Petitioner has also contracted with carpet layers, shoe repair workers, and picture frame workers (*supra*, p. 6).

larger unit more appropriate. The fact that the Union in this case accepts membership and is now seeking to organize on a store-wide basis does not require the Board to deny a small presently organized craft group access to the Act's election machinery; nor does the Board's present action foreclose it in the future from reshaping the bargaining unit upon a more comprehensive basis."[49] While, in some situations, the Board lends approval to store-wide units in department-store cases, it frequently holds a craft or related unit appropriate.[50]

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[49] Petitioner's fears (Br. 27) that the operations of its store may be disturbed by a long series of elections each conducted on a craft basis are wholly speculative. In applying the "extent of organization" principle the Board frequently points out, as it did here (R. 11, 13), that changes in the status of self-organization among the employees, foreseeable because of a union's broad organizational efforts, would require a subsequent enlargement of the unit. See, for example, *Matter of Knaust Brothers, Inc.*, 36 N. L. R. B. 915, 920; *Matter of Eves and Andresen*, 42 N. L. R. B. 1209, 1211–1212; *Matter of Foster-Grant Co., Inc.*, 32 N. L. R. B. 486, 489–490; *Matter of Crescent Dress Co.*, 29 N. L. R. B. 351, 354. Conversely, the previous unsuccessful attempts of a union to organize on a broader basis than the unit for which it petitions is not fatal to such a petition. *Matter of Standard Overall Co.*, 53 N. L. R. B. 960, 963.

[50] *E. g., Matter of The May Department Stores Co.*, 39 N. L. R. B. 471, 476–478; *Matter of J. L. Brandeis & Sons*, 47 N. L. R. B. 614, 616–617, enforced, 142 F. 2d 977, 981 (C. C. A. 8), certiorari denied, 323 U. S. 751; *Matter of Marshall Field & Co.*, 36 N. L. R. B. 748, 754–757, 758, 759–761; *Matter of The J. L. Hudson Co.*, 49 N. L. R. B. 273,

The Board properly rejected petitioner's contention that the employees in the women's alteration department and the fur work room must be included in the unit (R. 11). The facts that the women's clothing alteration workers are employed in a different part of the store from the men's,[51] that there was no such interchange of employees from one to the other as might be regarded as a practice, and that such transfers as did occur were either permanent or were intended to reduce the size of the busheling force (*supra*, note 7, p. 8), convinced the Board that there was no fluidity of interchange of personnel requiring a broader unit in order to make collective bargaining effective (R. 11). Finally, in rejecting petitioner's attempt to expand the unit, the Board (R. 11) took note of the fact that, traditionally, where alteration departments have been organized on a craft basis, the women's and men's alteration workers have been represented by separate craft unions (*supra*, pp. 7–8). It should also be noted that there were claims by another union that it represented large numbers of employees in the women's alteration

275–276, enforced without opinion, October 18, 1944, 15 L. R. R. 321 (C. C. A. 6); *Matter of Meier & Frank Co., Inc.*, 55 N. L. R. B. 101, 102–103; *Matter of The J. L. Hudson Co.*, 56 N. L. R. B. 406, 408–410.

[51] There is no inconsistency between the Board's partial reliance on this physical separation as a ground for excluding the women's alteration workers, and its inclusion of the basement bushelmen (cf. Br. 23). Physical separation is a factor to be considered, but it is by no means determinative.

department and that such department constituted an appropriate bargaining unit (R. 259–260).[52]

There is no merit to petitioner's suggestion that no rational basis exists to support a simple craft unit of bushelmen—one of the oldest organized crafts in the United States.[53] This readily identifiable, homogeneous group of workers, engaged in a traditional skilled craft, constitutes the archetype of an appropriate unit.

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[52] There was no such claim by a rival union in *Matter of J. L. Brandeis & Sons*, 47 N. L. R. B. 614, 617, enforced, 142 F. 2d 977, 981 (C. C. A. 8), certiorari denied, 323 U. S. 751, upon which petitioner relies (Br. 26). There is no merit to the petitioner's contention (Br. 25–27), that the grouping in one unit of employees engaged in altering men's, women's, and boys' clothing in the *Brandeis* case shows impropriety by the Board in excluding women's alteration and fur room employees from the bushelmen's unit in the instant case. In the *Brandeis* case, the employees grouped together had expressed a desire for such grouping (47 N. L. R. B. at 616). The Board's decision in that case does not stand for the proposition that in the absence of such an expressed desire the groups may not appropriately be separated. *Matter of The May Department Stores Co.*, 39 N. L. R. B. 471, upon which petitioner also relies (Br. 26), did not involve the question whether a unit of alteration workers would be appropriate if it failed to include those who work on women's clothing (39 N. L. R. B at 478).

[53] See Zaretz, C. E., *The Amalgamated Clothing Workers of America* (New York, 1934), pp. 54–68; Seidman, J., *The Needle Trades* (New York, 1942), pp. 79–89; Hardman, J. B. S. (ed.), *The Amalgamated Today and Tomorrow* (New York, 1939), pp. 89–90; Stowell, C. J., *The Journeymen Tailors Union of America—A Study in Trade Union Policy* (1918), pp. 82–128.

IV

THE BOARD PROPERLY CERTIFIED THE UNION AS EXCLUSIVE BARGAINING REPRESENTATIVE OF THE EMPLOYEES IN THE APPROPRIATE UNIT

Having received a majority of the votes cast in a Board-conducted election to determine the exclusive bargaining representative of petitioner's employees in an appropriate unit, the Union was properly certified by the Board. National Labor Relations Act, Section 9 (a), (c), Appendix A, *infra*, pp. ~~75–76~~ 76–77. The validity of the Board's certification is in no way rendered questionable by the fact that the authorization cards, upon the basis of which the Board determined that an interest in representation existed, ran to the United Department Store Employees Union, affiliated with the United Retail, Wholesale and Department Store Employees of America, C. I. O., the former being one of the locals affiliated with the Union, rather than to the Union. Cf. *National Labor Relations Board* v. *Franks Bros. Co.*, 137 F. 2d 989, 992 (C. C. A. 1), enforcing 44 N. L. R. B. 898, 910–911, affirmed, 321 U. S. 702; *Matter of A. Sartorius & Co., Inc.*, 40 N. L. R. B. 107, 120, enforced, *National Labor Relations Board* v. *A. Sartorius & Co., Inc.*, 140 F. 2d 203 (C. C. A. 2); *Matter of Northwestern Cabinet Co.*, 38 N. L. R. B. 357, 366–367; *National Labor Relations Board* v. *National Mineral Co.*, 134 F. 2d 424, 427 (C. C. A. 7), certiorari denied, 320

U. S. 753; see National Labor Relations Board, *Eighth Annual Report* (1944), p. 35. As the Board found, the Union represents its local affiliates in collective bargaining, and the employees were cognizant of this fact (R. 8, 90, 213). Cf. *Franks Bros.* case, *supra; Matter of A. Sartorius & Co., Inc., supra.* The Union was, therefore, eligible to file a petition for investigation and certification of representatives pursuant to Section 9 (c) of the Act.[54]

The showing of an interest in representation which the Board requires of the person or organization filing such a petition is merely an administrative requirement to advise the Board, as a preliminary matter, that there is sufficient justification for proceeding with the investigation of representatives.[55] The Board's administrative conclusion that a sufficient showing of interest in representation has been made to justify it in proceeding with the investigation of representatives is

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[54] Article III, Section 1 of the Board's Rules and Regulations (29 Code Fed. Reg. (Cum. Supp.) sec. 203.1), issued July 11, 1939, pursuant to section 6 of the Act provides that: "A petition to investigate and certify under section 9 (c) of the Act the name or names of representatives designated or selected for the purpose of collective bargaining may be filed by an employee or any person or labor organization acting on behalf of employees, or by an employer."

[55] *Matter of Buffalo Arms Corp.*, 57 N. L. R. B. 1560, 1561–1563; *Matter of The Beebe Corp.*, 59 N. L. R. B. 538; *Matter of Hillside Fluor Spar Mines*, 56 N. L. R. B. 664, 665; *Matter of Frigidaire Division, General Motors Corp.*, 54 N. L. R. B. 55, 56; *Matter of R. H. Siskin & Sons*, 41 N. L. R. B.

not subject to review. See *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 114 F. 2d 144, 148 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *National Mineral Co.*, 134 F. 2d 424, 426, 427 (C. C. A. 7), certiorari denied, 320 U. S. 753; *Beebe Corp.* v. *Millis*, 58 F. Supp. 993, 994 (S. D. N. Y.). An employer has no right under the statute or otherwise to compel a union to prove a majority by a method other than a Board-ordered election, or, indeed, by any particular method. *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. 2d 753, 758–759 (C. C. A. 7); *National Labor Relations Board* v. *Moltrup Steel Products Co.*, 121 F. 2d 612, 618 (C. C. A. 3); *National Labor Relations Board* v. *New Era Die Co., Inc.*, 118 F. 2d 500, 504 (C. C. A. 3); *International Association of Machinists* v. *National Labor Relations Board*, 110 F. 2d 29, 38 (App. D. C.), affirmed, 311 U. S. 72.

Moreover, even if the Board were required to determine the petitioning union's interest in rep-

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187, 188–189; *Matter of H. G. Hill Stores*, 39 N. L. R. B. 874, 876; *Matter of Interlake Iron Corp.*, 38 N. L. R. B. 139, 142–143; *Ninth Annual Report* (1944), pp. 23–24; *Eighth Annual Report* (1944), p. 44; cf. *National Labor Relations Board* v. *National Mineral Co.*, 134 F. 2d 424, 426 (C. C. A. 7), certiorari denied, 320 U. S. 753 ("The investigation and election authorized in the aid thereof under Section 9 (c) of the Act are administrative proceedings"). See also *Inland Empire District Council* v. *Millis*, No. 613, October Term 1944, decided June 11, 1945, slip opinion, pp. 8–9.

resentation, such an interest was in fact present. In determining the representative status of a labor organization, the Board is not concerned with the "technicalities of the laws of agency" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 295), "not with any isolation of the scrivenistic niceties of the petition, but with a practical evaluation of the whole situation from the petition and the circumstances surrounding it, together with all the other facts in evidence, as a reasonable basis for deciding that the employees had in fact selected the Union as their representative." *National Labor Relations Board* v. *Fargo Foundry Co.*, 141 F. 2d 462, 465 (C. C. A. 8); *Lebanon Steel Foundry* v. *National Labor Relations Board*, 130 F. 2d 404, 407 (App. D. C.), certiorari denied, 317 U. S. 659. Even if the authorization cards failed to reflect the Union's interest in representation, the Board's decision to hold an election did not prejudice petitioner. If there were an irregularity, only an employee, certainly not petitioner, would have standing to complain. As the Circuit Court of Appeals for the Seventh Circuit has held (*National Labor Relations Board* v. *National Mineral Co.*, 134 F. 2d 424, 426–427, certiorari denied, 320 U. S. 753):

> It is the agent of the employees that is being chosen, and not the agent of the employer. The employees have raised no question as to the proceedings in which their representative was selected. One

would naturally expect the employer, unless prejudicially disposed towards unions, to be indifferent to the question of who is to be chosen to represent the employees. * * *

The employer's interest and his great concern about whom the employees shall have as their representative for bargaining purposes are easily demonstrated as very unsubstantial. Suppose the stockholders of the respondent company or any corporation were holding a stockholders' meeting for the purpose of electing the bargaining representative of the stockholders, namely, the directors; and suppose fraud, forgery and sharp dealing of many kinds were used in the procurement and handling of the stockholders' proxies in such an election. Would the employer be likely to tolerate the protest of its employees, who were not stockholders, that the election was crooked and invalid? In what forum in this land of ample legal machinery could the employees be heard to challenge the election of the stockholders' representative for collective bargaining? This reverse statement of the case shows how ephemeral and unsubstantial the employer's objection is. * * *

See also *Botany Worsted Mills,* 133 F. 2d 876, 882 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. 2d 474, 478 (C. C. A. 5). Cf. Hearings, S. Committee on Education and Labor, S. 1958, 74th Cong., 1st Sess., pp. 718–719, 877–879.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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OCTOBER 1945.

APPENDIX A

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SEC. 1. * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

NATIONAL LABOR RELATIONS BOARD

* * * * *

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting com-

merce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or

may be established by agreement, code, law, or otherwise.

* * * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such

transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

APPENDIX B

In its regulations entitled "Procedure in Cases of Voluntary Applications to National War Labor Board for Wage Adjustments by Private Employers", issued on November 6, 1942, the National War Labor Board made provision for joint application for wage adjustments arrived at through collective bargaining (4 War Lab. Rep. XXXI, XXXIII–XXXIV). Section III, 3, of the regulations covered the instant situation (where an employer applies on his own initiative for a wage adjustment) and clearly recognized the interest of the collective bargaining representative in such application:

> * * * shall be signed either (a) jointly by the employer and a duly recognized collective bargaining agency for any or all of the employees who are to be affected by the proposed wage adjustment, or (b) by the employer alone. In either case the application shall state whether or not there is a duly recognized collective bargaining agency (for any or all of the affected employees) which has not joined with the employer in the application. If it appears that there is such an organization which has not so joined, the office of the Wage and Hour Division, to which the application has been submitted, shall, as agent of the Board, before acting on the application, send to the appropriate local officials of such organization a notice of the application, requesting the organization, if it has any ob-

> jections to the application being acted upon, so to inform the office. If no such objections are filed within seven days of the sending of the notice, or if the organization in question states that it has no objections, the application will then be acted upon. If objections are made within said period, the matter will be treated as a dispute case and referred to the Conciliation Service of the Department of Labor.

This provision was incorporated in the War Labor Board regulations entitled "Jurisdiction and Procedure of Regional War Labor Boards," issued April 5, 1943, as Section IV, B, 3 thereof, (6 War Lab. Rep. IX, XII) and in the regulations bearing the same title issued by the War Labor Board on April 15, 1943, amended on October 1, 1943 (9 War Lab. Rep. XXXIII). On June 22, 1943, Lloyd K. Garrison, then Executive Director and General Counsel of the National War Labor Board, in a memorandum to the Regional War Labor Boards, explained that:

> The phrase "a duly recognized collective bargaining agent" as used in Section IV, B, 3 of "Jurisdiction and Procedure of Regional War Labor Boards" refers either to a labor organization which has actually been recognized by the employer for the purpose of collective bargaining or a labor organization which has been certified by the National Labor Relations Board or a similar state agency, where the legal result of certification is that the employer is obliged to bargain with the union. Where there is such a labor organization and it has not joined in the application, it is entitled to receive a copy of the application before the application is processed.

> Where a labor organization has not been "duly recognized or certified" it may not receive a copy of the application but upon inquiry it should be told whether or not an application has been filed.

This explanation was appended to the phrase "a duly recognized collective bargaining agency" as a footnote (9 War Lab. Rep. XXXIII) and was later incorporated into the text of the regulation. 8 Fed. Reg. 16676, 16678.

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